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NO.
IN THE
SUPREME COURT OF THE UNITED STATES

PETER KANELOPOULOS

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Does association with individuals involved in a marijuana transaction, in and of itself, satisfy the constitutional requirement of proof beyond a reasonable doubt of possession of the marijuana involved in the transaction?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Peter Kanelopoulos requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming his conviction in the United States District Court for the Middle District of Louisiana of possession with intent to distribute marijuana.

OPINION BELOW

The opinion of the court of appeals, not yet officially reported, is printed in Appendix A. The district court judgment, which was not officially reported is printed

in Appendix B.

JURISDICTION

The judgment of the court of appeals was issued on August 9, 1982. This Petition is timely filed. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

21 U.S.C. §841 (a)(1):

(a) Except as authorized by this sub-chapter it shall be unlawful for any person knowingly or intentionally -

(1) to manufacture, distribute, or dispense or possess with intent to manufacture, distribute or dispense, a controlled substance.

STATEMENT OF THE CASE

Peter Kanelopoulos was tried on the single charge of possessing with intent to distribute approximately 2,010 pounds of marijuana. On 4 June 1980, the trial court, sitting without a jury, found the Defendant guilty after considering agreed, written stipulations of fact and exhibits.

Petitioner, Peter Kanelopoulos, appealed his conviction for possession with intent to distribute marijuana on the ground that the evidence was insufficient to establish his guilt beyond a reasonable doubt. His conviction was affirmed by the Fifth Circuit Court of Appeals.

According to the agreed stipulation of facts: one Peter Weyland agreed to purchase a quantity of

marijuana in Baton Rouge, Louisiana. One James Orrell, one of Weyland's employees met with an undercover Drug Enforcement Agent named Feldman and a Drug Enforcement Agency informant named Swift on 11 May 1979 in Springfield, Virginia. At that meeting Orrell told Feldman and Swift that a Winnebago camper and pickup truck would be driven to Baton Rouge, Louisiana to pick up a load of marijuana for Weyland.

A short time after that meeting, the three men left for Baton Rouge, Louisiana with Orrell in the Winnebago and Agent Feldman and Swift in a Ford pickup truck. During the course of the trip, Orrell stopped only for food and fuel or to telephone Peter Weyland. Orrell made approximately six telephone calls

to Weyland during the trip from Washington D.C. to Baton Rouge, Louisiana. In one of these telephone calls, Orrell was informed and reported to Feldman that the marijuana was of high quality and that Weyland was paying a high price for it.

The Winnebago which Orrell was driving had been purchased by Weyland through Orrell and was registered in Weyland's name at the time it was seized by the Drug Enforcement Agency. It had been modified to increase its load bearing capacity while appearing normal.

The two vehicles and three men, followed by surveilling DEA agents arrived in Baton Rouge, Louisiana, at approximately 6:15 a.m. on 12 May 1979. They went to a Ramada Inn where Orrell checked into one room

under an assumed named with Swift and Feldman checking into another room.

At approximately 6:40 a.m., Agent Feldman left the motel and drove the Winnebago across the street to a gas station. When he returned to the motel, he observed an individual later identified as Dana Cheney enter Orrell's room. The time of this observation is not known.

Orrell told Feldman not to come into that room since the "persons" inside did not want to be seen. The room had not been under surveillance and who, besides Dana Cheney comprised the "other persons" is not known.

Feldman left the area of the motel room and went to the coffee shop for an unknown period of time. When Feldman left the coffee shop and returned to the vicinity of the room

he noticed Peter Kanelopoulos enter Orrell's room. At 8:00 a.m., Agent Feldman telephoned DEA Agent Jack Redford and informed him that he had seen Cheney and Kanelopoulos enter Orrell's room. Twenty minutes after this call, at 8:20 a.m., Orrell informed Feldman and Swift that the load was smaller than expected and that they would not be needed to drive part of it back to Washington D.C. They were each to receive $1,000 for making the trip and were given $200 cash for expenses on the return trip. They were also informed that the "stash house" was only five minutes away and that loading would take about twenty minutes. As soon as the loading was completed, Orrell said he would notify them.

The telephone in Orrell's room was not monitored and there is no information

available regarding telephone calls made from or received by that room. Since the room was not under surveillance, it is unknown when the "other" persons" left that room nor is the identity of anyone other than Cheney and Kanelopoulos established.

When the Winnebago left the motel, it was later observed on Hoo Shoo Too Road parked behind a red and white automobile. The time was 9:00 a.m. The make, model, or license plate number of this vehicle is not known. The red and white vehicle had two occupants and one was observed standing outside of the Winnebago talking to the Winnebago's occupants. The identity of that individual and the identity of the red and white automobile 's

passenger was not learned by the police. The automobile left the scene and returned later at which time the Winnebago followed it to a parking lot. At the parking lot, the driver of the red and white automobile entered the Winnebago which then went to a house on Arnold Lane. The automobile and its passenger were not followed and their actions are unknown.*/

When the Winnebago arrived at Arnold Lane, there were several unidentified white males present. The Winnebago remained at that address for approximately twenty minutes, after which it went to a service station where Orrell placed a telephone call informing Feldman that he had the load and was en route

*/Not one of the law enforcement officers in the surveillances conducted in this case ever identified Peter Kanelopoulos as being in or near Peter Weyland's Winnebago, the red and white automobile or the Arnold Lane house.

back to Washington D.C.

The Winnebago was followed by police agents until it was stopped and its occupants, James Orrell and Dana Cheney, were removed and arrested. A search of the Winnebago revealed the 2,010 pounds of marijuana.

After the marijuana was seized, the Arnold Lane residence was placed under surveillance. It's owner, Anthony Kelly, his wife, and his child were identified leaving the residence. Thereafter, the residence was secured but the police found no one present at that time. A search warrant was executed and approximately 120 pounds of marijuana were seized.

As for Peter Kanelopoulos, his name was signed on a contract for a rental car

the same day as the seizure. "However," as stated in the opinion below, "Kanelopoulos' signature was not verified by a handwriting expert."*/ A red and white Dodge Magnum automobile whose license plates matched that on the rental contract was observed by a state trooper several days after the Winnebago seizure.

Peter Kanelopoulos was seen later on the day of the seizure deplaning from a flight in Washington D.C. which had originated in Baton Rouge, Louisiana with a lay-over in Atlanta, Georgia. His name was not on the passenger list. Despite the lack of evidence connecting Peter Kanelopoulos to the Winnebago, the

*/This is different than the signature of Peter Weyland, whose registration in the hotel room in Baton Rouge was verified by a handwriting expert. Peter Kanelopoulos handwriting tests were not used by the prosecution, nor were they made available to the defense.

Arnold Lane residence, Peter Weyland, or the marijuana, he was convicted of possessing the 2,010 pounds of marijuana with the intent to distribute it and his conviction was affirmed by the circuit court. He now faces a prison sentence and a fine.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD RESOLVE WHETHER A CONVICTION CAN BE UPHELD WHERE GUILT IS ASSUMED FROM ASSOCIATION WITH INDIVIDUALS INVOLVED IN A MARIJUANA TRANSACTION, BUT WITHOUT PROOF BEYOND A REASONABLE DOUBT.

The opinion below merits review because it violates the First Amendment right of freedom of association and the due process requirement of the Fifth Amendment that evidence of guilt must be established as to each and every element of the offense beyond a reasonable doubt. Mullaney v. Wilbur, 421 U.S. 684 (1975); In re Winship, 397 U.S. 358 (1970). The government did not present sufficient evidence to prove that Peter Kanelopoulos was guilty of possession with intent to distribute marijuana.

When reviewing the sufficiency of the evidence, the evidence must be taken in a light most favorable to the government and the verdict sustained if there is "substantial evidence" to support it. Glasser v.

United States, 315 U.S. 60, 80 (1942). If, however, after reviewing the evidence in the light most favorable to the government, "reasonable minds could conclude that the evidence is inconsistent with any reasonable hypothesis of the accused's innocence" then he must be found not guilty. United States v. Alfrey, 620 F.2d 551, 555 (5th Cir.), cert. denied, 449 U.S. 938 (1980); Glasser, supra at 80.

Giving the government the benefit of all reasonable inferences in this case, it remains clear that the guilt of the Petitioner was not established beyond a reasonable doubt, to the exclusion of all reasonable hypotheses of innocence.

At the very most, the government proved that the Petitioner was in the hotel room of a person (Orrell) involved in transporting a large quantity of marijuana in a Winnebago; that the

Petitioner rented a red and white Dodge Magnum automobile on the day of the marijuana seizure; that a red and white automobile rendezvoused with the Winnebago prior to it being loaded with the marijuana; and that the Petitioner flew from Baton Rouge to Washington D.C. a short time after the seizure of the Winnebago and was not listed as a passenger. Even if the red and white car rented by the Petitioner was the same red and white vehicle which met with the Winnebago, Petitioner was not identified as the "white male" who conversed with the Winnebago's occupants or the driver who entered the Winnebago in the parking lot.

Because Orrell had registered at the hotel under an assumed name, it can be inferred that some arrangment or communication was made enabling the Petitioner to find the room. However, evidence that

the Petitioner met with Orrell prior to the time Orrell gained possession of the marijuana and that the Petitioner later returned to Washington D.C. with his name omitted from the passenger list was not sufficient to prove his dominion and control of the 2010 pounds of marijuana found in Weyland's Winnebago. Suspicion that he was somehow involved is not enough to establish possession.

Neither the district court nor the court of appeals limited their review to the evidence in the record however. Instead, guilt was assumed from facts not in evidence. The court disregarded various reasonable hypotheses consistent with Petitioner's innocence.

The basic assumption appears to be that Peter Kanelopoulos directed Orrell to the marijuana or told him about the size of the load. The opinion below

points out that Agent Feldman was informed that the load was smaller than expected and that he would not be needed shortly after Kanelopoulos entered Orrell's room. The court of appeals, however, has misread the facts; the evidence does not establish that Agent Feldman returned to the hotel at 8:15 a.m. and saw Dana Cheney, nor does it establish that shortly thereafter, Petitioner entered Orrell's room. In actuality, Agent Feldman's testimony was that he left the hotel at 6:40 a.m., drove the Winnebago across the street to a closed service station and returned at an undisclosed time. Obviously, however, he returned earlier than the court of appeals assumed because at 8:00 a.m., Agent Feldman informed Agent Rayford that Cheney and Kanelopoulos had entered the room (A. 29). Agent Feldman learned of the reduced load

at 8:20 a.m., not immediately after the Petitioner's appearance.

Moreover, as the court of appeals itself recognized, Cheney's appearance made it just as likely that he, rather than the Petitioner, was the source of the information regarding the change of cargo. slip. opinion at page A17 . It would be consistent with the evidence to infer that Weyland was the source of the information about how much marijuana he bought. It is clear that Weyland was in control of the entire operation and he and Orrell had been in frequent telephone contact during the trip. He owned the Winnebago, and Orrell was Weyland's employee. Everyone was ostensibly working for him. The evidence also establishes that Weyland was in a Baton Rouge hotel on the day in question. Weyland may have arrived at Orrell's room while Agent Feldman was at the service station or he may have

reached Orrell by telephone.

The court of appeals ignored evidence of those possibilities and assumed that Kanelopoulos was the source of the information, that the "red and white vehicle" which later met with the Winnebago was the same car rented by Petitioner, and apparently that the white male whom the Agents could not identify and who entered the Winnebago when it travelled to the stash house was Peter Kanelopoulos. Of course that white male could have been anyone including Cheney, Weyland or Kelly. (The owner of the stash house). For the purposes of a conviction though, it was assumed that Kanelopoulos and no one else was the "white male."

But "defendants may not be assumed into the penitentiary." United States v. Tonelli, 577 F. 2d 194, 200 (3d Cir. 1978), quoting United States v. Brumley,

560 F.2d 1268 (5th Cir. 1977). Similarly, as the Tenth Circuit Court of Appeals has held, the evidence must do more than raise a suspicion of guilt. Lewis v. United States, 420 F. 2d 1089 (10th Cir. 1970). The Fifth Circuit has stated the rule which it should have applied in this case:

> "If the conclusion that all hypothesis of innocence have been excluded could be reached only as a result of speculations or assumptions about matters not in evidence, then the verdict must be overturned."

United States v. Martinez, 555 F. 2d 1269, 1271 (5th Cir. 1977); United States v. Box, 530 F.2d 1258, 1267 (5th Cir. 1976).

It was the duty of the court below to consider whether the evidence excluded every reasonable hypothesis of innocence and established the guilt of the Petitioner beyond a reasonable doubt. The opinion below clearly lacks such consideration.

Like Feldman and Swift, the Petitioner may have been an intended driver who was

no longer needed because of the reduced load and instead of cash was given a plane ticket home in someone else's name. He may have been a messenger for Weyland or for Kelly, or for someone else entirely. He may even have been a prospective purchaser on his own who was squeezed out by Weyland. But even such involvement would not give him dominion and control over the marijuana seized from the Winnebago.

The government's burden was to prove beyond a reasonable doubt that Peter Kanelopoulos was guilty of possession with intent to distribute the 2,010 pounds of marijuana seized from the Winnebago. In order to be properly convicted, the government had to prove "...some nexus between the accused and the prohibited substance." United States v. Berg, 504 F.2d 914, 917 (5th Cir. 1974). There

is no evidence that the Petitioner ever directly possessed or controlled any marijuana, was in any way connected to or in the Winnebago where the marijuana was found, or at the Kelly house where the marijuana was loaded.

The opinion below asserts he was in constructive possession. This necessarily assumes he exercised dominion and control over the marijuana. See United States v. Ocanas, 628 F.2d 353 (5th Cir. 1980). These elements are not proved by the fact that Orrell acquired the marijuana sometime after Kanelopoulos arrived at his hotel room.

It is well settled that mere presence or assocation with individuals who have control or possession will not suffice to support a conviction for possession. United States v. Batimana, 623 F. 2d 1366 (9th Cir. 1980); United States v. Watkins, 171 U.S. App. D.C. 158,519 F.2d 294 (D.C. Cir. 1975); United

States v. Holland, 144 U.S. App. D.C. 225, 445 F. 2d 701 (D.C. Cir. 1971); see also United States v. DiRe, 332 U.S. 581, 593 (1948).

The Third Circuit, in an en banc decision, has held that constructive possession requires a greater showing than speculation that the accused exercised dominion and control over the substance in question. In United States v. Bonham, 477 F.2d 1137 (3d Cir. 1973) (en banc), two defendants were shown to share a bedroom in which controlled substances were secreted. Even though both were present and could have exercised dominion and control over the substance the conviction of the individual on appeal was reversed because it was based on speculation as to whether or not that defendant exercised such control.

The opinion below conflicts with these decisions of other circuits and of this Court establishing that speculation and

assumptions are no substitute for the requirement of proof beyond a reasonable doubt. The Petitioner was assumed to be guilty because the court below suspected he might be involved or have control. But the evidence shows that Weyland was the one in control. The evidence in the record establishes Weyland's contructive possession and Cheney and Orrell's actual possession. There is only speculation as to the Petitioner's guilt.

CONCLUSION

Petitioner recognizes that this case does not necessarily break new ground in the further reaches of the development of our criminal law. It is precisely for this reason, however, that this case ought to be considered by this Court. The lower court misapplied the facts and reached an erroneous conclusion about Petitioners'guilt. There must be a way to avoid the consequences of this erroneous conviction.

Giving the government every conceivable benefit from the evidence the most that can be said about Petitioner is that he met under suspicious circumstances with Weyland's employee, Orrell and with Cheney, that he rented a car which rendezvoused

with Weyland's Winnebago, and that he returned to Washington, D.C. from Baton Rouge under suspicious circumstances. These suspicions when piled together still do not establish that Peter Kanelopoulos had dominion and control over the marijuana which Weyland purchased and had transported for him in his Winnebago.

Nothing in the evidence indicates that Petitioner was Weyland's boss. Nothing in the record indicates that Petitioner was Kelly's boss. Nothing in the record indicates that Petitioner was an employee of either Weyland or Kelly. Even if Petitioner were working for Weyland, nothing in the record indicates that he was still doing that when Weyland obtained the marijuana and had it put

in his Winnebago. The same applies for Kelly.

Justice should be applied to the meek as well as the mighty, to the big case as well as to the little one. A little injustice is as devasting to our freedom as is a large one. For Justice is supposed to apply to all. We pray the writ be granted.

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of September, 1982, three true and accurate copies of this Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed, first class, postage prepaid, to the Office of the Solicitor General, Department of Justice, Washington D.C.

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